Washington University Law Review

Volume 60 | Issue 3

January 1982

Common-Law Felony Murder Doctrine Judicially Abolished in Michigan: People v. Aaron, 299 N.W.2d 304 (1980)

COMMON-LAW FELONY MURDER DOCTRINE JUDICIALLY ABOLISHED IN MICHIGAN

People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980)

In *People v. Aaron*,[1] the Michigan Supreme Court judicially abolished[2] the common-law felony murder doctrine,[3] finding the doctrine in violation of the basic criminal law principle of individual culpability.[4]

Defendant, Stephen Aaron, and an accomplice took jewelry and money from their intended victim's apartment while awaiting his return.[5] When the victim returned they shot and killed him.[6] The Recorder's Court of Detroit convicted Aaron of first degree felony murder and the court of appeals affirmed.[7] The Michigan Supreme Court first remanded the case for resentencing and then granted Aaron's application for reconsideration. The question on reconsideration was whether the court could reduce the defendant's conviction of first-degree murder to second-degree murder[8] because the trial court only instructed the jury on felony murder.[9] Upon review of *Aaron* and two other felony

1. 409 Mich. 672, 299 N.W.2d 304 (1980).

2. Michigan is the first state to abolish the felony murder rule judicially. A Michigan statute does, however, mandate the application of the felony murder doctrine in some instances. MICH. COMP. LAWS ANN. §§ 750.316, .317 (Cum. Supp. 1980). State legislatures have abolished the felony murder rule in Kentucky, Hawaii, and Ohio. *See infra* note 62 and accompanying text.

3. The felony murder doctrine finds all participants of a felony guilty of murder for deaths occurring during the perpetration of the felony. Crum, *Causal Relations and the Felony Murder Rule,* 1952 WASH. U.L.Q. 191, 192.

4. *See generally* MODEL PENAL CODE § 201.1, comment 1 (Proposed Official Draft 1962); R. PERKINS, CRIMINAL LAW 37-45 (2d ed. 1969); Morris, *The Felon's Responsibility for the Lethal Acts of Others,* 105 U. PA. L. REV. 50, 59-61 (1956).

5. The court of appeals stated that the defendant went to the victim's apartment and expressed his intention to kill him. People v. Aaron, 63 Mich. App. 230, 231, 234 N.W.2d 462, 463 (1975). The trial court, however, convicted the defendant of "first degree felony murder as a result of a homicide committed during the perpetration of an armed robbery." 409 Mich. at 688, 299 N.W.2d at 307. It is unclear why the prosecution relied on the felony murder doctrine to obtain a first-degree murder conviction when there was an intent to kill.

6. *See* 63 Mich. App. 230, 230-31, 234 N.W.2d 462, 462-63 (1975).

7. *Id.*

8. The authors of the Model Penal Code distinguish the various degrees of homicide on the basis of the individual's state of mind. First-degree murder is "knowingly committed." Second-degree murder is recklessly committed. Manslaughter may be accidentally committed. MODEL PENAL CODE, § 201.1, comment 4, at 39 (Tentative Draft No. 9, 1962). *See also* People v. Carter, 387 Mich. 397, 197 N.W.2d 57 (1972); *supra* note 77 and accompanying text.

9. 409 Mich. at 689, 299 N.W.2d at 307. The trial court denied Aaron's motion for an instruction on lesser-degree murder and manslaughter offenses.

murder cases[10] the Michigan Supreme Court reversed *Aaron*[11] and *held*: The common-law felony murder doctrine, by substituting the intent to commit a felony with the malice aforethought required for first-degree murder,[12] violates the basic principle of criminal law that bases liability on individual culpability[13] and is therefore abolished in the State of Michigan.[14]

Sir Edward Coke first derived the felony murder doctrine in *Lord Dacres' Case*[15] and *Mansell and Herbert's Case*[16] from the common-

10. The companion cases were People v. Thompson, 81 Mich. App. 348, 265 N.W.2d 632 (1978), *aff'd,* 409 Mich. 672, 299 N.W.2d 304 (1980) and People v. Wright, 80 Mich. App. 172, 262 N.W.2d 917 (1977), *aff'd,* 409 Mich. 672, 299 N.W.2d 304 (1980).

In *Thompson*, the Saginaw County Circuit Court convicted the defendant of armed robbery and first-degree murder. 402 Mich. 938 (1978). The court of appeals reversed both convictions and remanded, and the Michigan Supreme Court granted leave to appeal. 81 Mich. App. 348, 265 N.W.2d 632 (1978), *leave to appeal granted,* 402 Mich. 938 (1978).

In *Wright* the Washtenaw County Circuit Court convicted the defendant on two counts of first degree murder for two deaths resulting from a fire which the defendant had set. 402 Mich. 938 (1978). The court of appeals reversed and remanded the case, requiring an instruction on malice, and a separate finding of malice from the intent to commit the underlying felony. 80 Mich. App. 172, 262 N.W.2d 917 (1977), *leave to appeal granted,* 402 Mich. 938 (1978).

In both *Thompson* and *Wright* the Michigan Supreme Court granted leave to appeal to answer the narrow question of whether the court of appeals erroneously reversed the murder convictions "because of the lack of an instruction on a requirement for finding malice in a felony murder situation." 409 Mich. at 689, 299 N.W.2d at 307.

11. In *Aaron* the court reversed the conviction and remanded the case to the trial court. In *Thompson* and *Wright* the court affirmed the court of appeals' decisions and remanded both cases to the trial courts. 409 Mich. at 734, 299 N.W.2d at 329.

12. "Malice aforethought is the grand criterion which now distinguishes murder from other killing." 4 W. BLACKSTONE, COMMENTARIES *192, 198. The common law defined malice aforethought as the intent to kill, the intent to commit serious bodily injury, or a wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or serious bodily harm. *See* R. PERKINS, *supra* note 4, at 37.

13. *See generally* sources cited *supra* note 4.

14. 409 Mich. at 733, 299 N.W.2d at 328.

15. 72 Eng. Rep. 458 (K.B. 1535).

16. 73 Eng. Rep. 279 (K.B. 1558).

In *Lord Dacres' Case*, Lord Dacres and his companions were unlawfully hunting in a park. The participants had previously agreed to kill anyone who tried to stop them. One of Lord Dacres' companions killed a gamekeeper. Lord Dacres was convicted of murder under a theory of constructive presence even though he was not present at the killing. *See* 409 Mich. at 690, 299 N.W.2d at 308-09.

In *Mansell and Herbert's Case*, Herbert and more than forty followers went to rob Sir Richard Mansfield. One of Herbert's servants threw a stone, intending to strike someone guarding Mansfield's dwelling. Instead, the stone struck and killed an unarmed woman emerging from the house. The court convicted Herbert of murder for the servant's act. *See* 409 Mich. at 691, 299 N.W.2d at 308.

Some commentators suggest that *Lord Dacres' Case* turned upon the felons' actual intent to kill

law theory of constructive malice[17] by implying the intent to commit murder from underlying felonious acts. Crown courts strictly applied the rule[18] in a few subsequent cases,[19] but gradually modified and limited its application until Parliament abolished it in 1957.[20]

Several English courts, pursuant to the felony murder rule, required a deliberate unlawful act to impute the requisite malice for murder or required that the act evidence an intent to inflict personal violence.[21]

---

whomever might resist their unlawful adventure. *See, e.g.,* Kaye, *The Early History of Murder and Manslaughter, Part II,* 83 L.Q. REV., 569, 578-79, 593 (1967); Note, *Felony Murder as a First Degree Offense: An Anachronism Retained,* 66 YALE L.J. 427, 430-31 n.23 (1957); 59 DICK. L. REV. 183, 185 (1955). Another commentator distinguishes *Mansell & Herbert's Case* from other felony murder cases because it involved a deliberate act of violence. *See* Moessel, *A Survey of Felony Murder,* 28 TEMP. L.Q. 453 (1955). Nevertheless, the following statement of the felony murder rule by Lord Coke is most often cited, along with *Lord Dacres'* and *Mansell and Herbert's Case*, as the origin of the felony murder rule:

> If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.
>
> So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium* [misadventure]: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.

3 E. COKE, INSTITUTES *56 (1797), *quoted in* People v. Aaron, 409 Mich. 672, 692, 299 N.W.2d 304, 309 (1980).

17. Sir Edward Coke used the constructive malice doctrine to equate the intent to commit the underlying felonious act with the malice required for murder, even if the resultant death was accidental. 3 E. COKE, *supra* note 16, at *56. *See* J. MILLER, CRIMINAL LAW § 88(3) (1934); D. STROUD, MENS REA 169-70 (1914).

18. The common-law theory of constructive malice finds malice or the intent to kill where there is no actual intent to kill. For instance, the intent to commit a crime that might result in violence may, under the constructive malice theory, result in a murder conviction because the courts will imply malice even if the death was accidental. 3 E.COKE, *supra* note 16, at *5-6. Thus, actual intent to kill is unnecessary for a felony murder conviction. J. MILLER, *supra* note 17, at § 88(3); D. STROUD, *supra* note 17, at 169-170.

19. *See, e.g.,* Regina v. Holland, 174 Eng. Rep. 313 (1841) (if defendant's act ultimately results in death, defendant is guilty even though the actual cause of death was victim's refusal to accept proper medical treatment); Sir Charles Stanley's Case, 84 Eng. Rep. 1094 (1663) (if a man joins in an unlawful act, even without knowledge of its unlawfulness, he is guilty of all that follows from the act).

20. Section one of England's Homicide Act, which abolished the felony murder rule, requires that a killing be with malice aforethought, express or implied, before finding the defendant guilty of murder. 5 & 6 Eliz. 2, ch. 11, § 1 (1957). *See generally* Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder,* 57 COLUM. L. REV. 624, 635 (1957).

21. *See, e.g.,* Rex v. Plummer, 84 Eng. Rep. 1103, 1106 (K.B. 1701) (felon not liable for killing of cofelon by law enforcement officer); Rex v. Keate, 90 Eng. Rep. 557, 558 (K.B. 1697)

Some courts insisted that the felonious act be malum in se,[22] or that the killing be in furtherance of a felonious purpose.[23] In *Regina v. Serne*,[24] Justice Stephens limited the felony murder rule to cases in which the unlawful act created a substantial and foreseeable risk of human injury. In *Regina v. Greenwood*,[25] the court further modified the rule by requiring an instruction on the lesser included offenses of felony murder.[26]

State legislatures and courts in the United States have substantially limited and modified the common-law felony murder rule.[27] A few jurisdictions, nevertheless, have applied the rule harshly,[28] and some

(employer stabbed gardener for refusing to return some keys; not murder unless deliberate unlawful act done with intent to injure).

22. An act is malum in se if it is inherently evil in nature and consequence. BLACK'S LAW DICTIONARY 865 (5th ed. 1979). *See generally* 8 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 255 (1926); R. PERKINS, *supra* note 4.

23. King v. Borthwick, 99 Eng. Rep. 136, 138-39 (1779) (no murder when bystander killed during fight between defendant and others because identity of actual killer unknown and no proof that all prisoners were of "same pursuit"). *See also* MacKalley's Case, 9 Co. Rep. 67b (1612); Mansell and Herbert's Case, 73 Eng. Rep. 279 (K.B. 1558); C. KENNY, OUTLINES OF CRIMINAL LAW 255 (1926); R. PERKINS, *supra* note 4.

24. 16 Cox C.C. 311 (1887) (felony murder charge for death of a son from fire allegedly set by defendant). *See also* Rex v. Lumley, 22 Cox C.C. 635 (1911); Regina v. Whitemarsh, 62 Just. 711 (1898); Regina v. Towers, 12 Cox C.C. 530 (1874); Queen v. McIntyre, 2 Cox C.C. 379 (1847). *Cf.* Regina v. Horsey, 176 Eng. Rep. 129 (1862) (court allowed jury to find for defendant if victim could have been intervening cause in own death by entering barn after defendant set barn on fire).

25. 7 Cox C.C. 404 (1857).

26. In *Greenwood*, the court allowed the jury to reach a manslaughter verdict when the defendant had raped a child who subsequently died from venereal disease contracted during the rape. *See* 409 Mich. at 697 n.43, 299 N.W.2d at 311 n.43.

27. *See generally* Adlerstein, *Felony-Murder in the New Criminal Codes,* 4 AM. J. CRIM. L. 249 (1976); Crum, *supra* note 3; Moessel, *supra* note 16; Note, *Felony Murder Rule—In Search of a Viable Doctrine,* 23 CATH. LAW. 133 (1978) [hereinafter cited as *Felony Murder Rule*].

28. In Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941), and in Commonwealth v. Lessner, 274 Pa. 108, 118 A. 24 (1922), the Pennsylvania Supreme Court held that any homicide committed during the perpetration of a felony is murder, even if the killing is involuntary or unintentional.

Some cases have held that any killing committed during the res gestae of a felony is automatically murder under the felony murder rule. *See, e.g.,* State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936) (attempted burglary); People v. Smith, 187 N.Y.S. 836 (burglary), *rev'd,* 232 N.Y. 239, 133 N.E. 574 (1921). *See also* Evans v. State, 109 Ala. 11, 19 So. 535 (1896) (felon responsible for killing done by cofelon, regardless of intent); State v. Moffitt, 199 Kan. 514, 431 P.2d 879 (1967) (unintentional killing committed while defendant is in felonious possession of a pistol is first-degree murder); State v. Fisher, 120 Kan. 226, 243 P. 291 (1926) (words "any murder" in statute mean any killing); State v. Roselli, 109 Kan. 33, 198 P. 195 (1921) (felon satisfies statutory equivalents of deliberation and premeditation for first-degree murder by perpetrating one of enumerated felonies).

states continue to classify a homicide committed during any felony as first-degree murder.[29] Most states, however, now apply the felony murder rule only when a homicide occurs during specifically enumerated felonies.[30] Furthermore, the rule's application is limited by restrictions concerning the act,[31] the actor,[32] the victim,[33] the underlying felony,[34] and the defendant's mental state.[35]

The act requirements focus on the time element and the causal relation between the felony and the homicide. Several states insist that the homicide occur in the course of the felony, sometimes including acts done immediately before the commission of the felony and acts done while the felons are fleeing the scene of the crime.[36] Other jurisdictions construe the res gestae of the crime more narrowly,[37] or leave the tim-

29. GA. CODE ANN. § 26-1101 (1980 Supp.); KAN. STAT. ANN. § 21-3401 (1974); N.M. STAT. ANN. § 30-2-1 (1978); N.C. GEN. STAT. § 14-17 (Cum. Supp. 1980). *Cf.* OKLA. STAT. ANN., tit. 21, §§ 701.1, .2 (West Supp. 1980) (homicide committed during felony other than those enumerated is murder in second degree); PA. STAT. ANN., tit. 18, § 2502 (Purdon Supp. 1980) (homicide committed during any felony is murder in second degree).

30. Robbery triggers the felony murder rule in 36 states; burglary in 33 states; arson in 32 states; rape in 31 states; kidnapping in 26 states; escape in 12 states.

California, Idaho and Maryland apply the rule for mayhem. Michigan and Tennessee include larceny. Maryland, New Jersey, New York, Utah, and Virginia include sodomy. Arizona, California, Colorado, Nevada, and Oklahoma specify sexual molestation of a child. Eleven states include other sexual offenses: Alabama, Colorado, Connecticut, Florida, Minnesota, Montana, Nebraska, New York, North Dakota, Pennsylvania, and Utah.

Arkansas, Florida, Nebraska, and Tennessee apply the felony murder doctrine to aircraft piracy. California, Florida, and Tennessee apply the rule when the defendant uses bombing and destructive devices. Maryland applies the doctrine for housebreaking; Michigan does so for extortion.

31. *See infra* notes 36-41 and accompanying text.

32. *See infra* notes 50-54 and accompanying text.

33. *Id.*

34. *See infra* notes 42-49 and accompanying text.

35. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 563 (1972).

36. *See, e.g.,* Bizup v. People, 150 Colo. 214, 371 P.2d 786 (1962) (defendant shot victim while fleeing from robbery); People v. Goree, 30 Mich. App. 490, 186 N.W.2d 872 (1971) (policeman killed while felons fleeing from scene of crime); MacAvoy v. State, 144 Neb. 827, 15 N.W.2d 45, *cert. denied,* 323 U.S. 804 (1944) (death of victim after forcible rape); State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950) (took loot away within res gestae of crime); Commonwealth v. Doris, 287 Pa. 547, 135 A. 313 (1926) (policeman killed by cofelon during attempt to flee from crime).

In State v. Adams, 339 Mo. 926, 98 S.W. 632 (1936), the court held that when the initial crime and the homicide are part of a continuous transaction and closely related in time, place, and causal relation, the homicide is within the res gestae of the felony.

37. *See, e.g.,* State v. Opher, 38 Del. 93, 188 A. 257 (1936) (shooting rape victim after rape complete not within res gestae of underlying felony); People v. Smith, 55 Mich. App. 184, 222 N.W.2d 172 (1974) (killing of robbery victim after defendant had escaped from scene of crime not

ing question for the jury.[38] Some states prescribe that the felon's acts must be the proximate cause of the homicide,[39] setting in motion the entire chain of events leading to the death.[40] Other jurisdictions require that the homicide result from an act committed in furtherance of the felonious enterprise.[41]

---

within res gestae of robbery), *aff'd in part,* 396 Mich. 825 (1976); Huggins v. State, 149 Miss. 280, 115 S. 213 (1928) (prosecution must prove that felons agreed to kill anyone standing in way at any time during commission of underlying felony to find felony murder); People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933) (killing of victim during escape attempt after abandoning loot not first-degree felony murder without proof of deliberation and intent); People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906) (killing of policeman chasing defendant after unsuccessful burglary attempt not within res gestae of attempted burglary); People v. Joyner, 32 App. Div.2d 260, 301 N.Y.S.2d 215 (1969) (killing of victim before formation of intent to rob not felony murder), *rev'd,* 26 N.Y.2d 106, 257 N.E.2d 26, 308 N.Y.S.2d 840 (1970); State v. Diebold, 152 Wash. 68, 277 P. 394 (1929) (killing of victim while attempting to return stolen automobile not within res gestae of theft); State v. Golladay, 78 Wash. 2d 121, 470 P.2d 191 (1970) (killing of victim after rape and larceny completed not within res gestae of crime). *See also* People v. Marwig, 227 N.Y. 382, 125 N.E. 535 (1919); Arent & MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes,* 20 CORNELL L.Q. 288 (1934); Cadmus, *The Beginning and End of Attempt and Felonies Under the Statutory Felony Murder Doctrine,* 51 DICK. L. REV. 12 (1946); Corcoran, *Felony Murder in New York,* 6 FORDHAM L. REV. 43 (1937).

38. *See, e.g.,* People v. Sirgnano, 42 Cal. App. 3d 794, 117 Cal. Rptr. 131 (1974); People v. Smith, 55 Mich. App. 184, 222 N.W.2d 172 (1974), *aff'd in part,* 396 Mich. 825, 238 N.W.2d 536 (1976); People v. Jackson, 20 N.Y.2d 440, 231 N.E.2d 722, 285 N.Y.S.2d 8, *cert. denied,* 391 U.S. 928 (1967). *See generally* Adlerstein, *supra* note 27; Crum, *supra* note 3; Moessel, *supra* note 16.

39. *See* Commonwealth v. Bolish, 381 Pa. 500, 516-17, 113 A.2d 464, 473 (1955) (defendant's felonious act not probable cause of cofelon's death when cofelon's act of setting fire was intervening force between defendant's actions and accomplice's death). *See also* People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959); People v. Graves, 52 Mich. App. 326, 217 N.W.2d 78 (1974); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947); Commonwealth v. Kelly, 333 Pa. 280, 4 A.2d 805 (1939). *See generally* Adlerstein, *supra* note 27; Crum, *supra* note 3; Moessel, *supra* note 16; 17 FORDHAM L. REV. 124 (1948); 22 TULANE L. REV. 325 (1947).

40. Some states require that the felon cause the death for a first-degree murder conviction. *See* ARK. STAT. ANN. §§ 41-1501 to -1505 (1977); LA. REV. STAT. ANN. §§ 14:30, :31 (West 1974); MISS. CODE ANN. § 97-3-19 (Cum. Supp. 1980); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1980); N.D. CENT. CODE § 12.1-16-01 (1976); OR. REV. STAT. 163.115 (1979); WASH. REV. CODE ANN. §§ 9A.32.030 to 9A.45 (Supp. 1981). *See also* State v. Canola, 135 N.J. Super 224, 343 A.2d 110 (1975).

41. *See* ARK. STAT. ANN. §§ 41-1501 to -1505 (1977); COLO. REV. STAT. § 18-3-102 (Cum. Supp. 1980); CONN. GEN. STAT. §§ 53a-54C (1980); DEL. CODE ANN. tit. 11, §§ 635-636 (Cum. Supp. 1980); LA. REV. STAT. ANN. §§ 14:30, :31 (1974); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1980); N.D. CENT. CODE § 12.1-16-01 (1976); OR. REV. STAT. § 163.115 (1979); TEX. CRIM. PROC. CODE ANN. § 19.02 (Vernon Supp. 1980); WASH. REV. CODE ANN. §§ 9A.32.030 to .045 (Supp. 1981). *See also* People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952) (defendant guilty of felony murder for starting fight which resulted in victim's death); People v. Ryan, 263 N.Y. 298, 189 N.E. 225, (1934) (acts done between period of 225, (1934) (acts done between period of inception of attempt to commit felony and

The underlying felony requirements focus on the dangerousness of the underlying act. Several states, by statute[42] or case law, require an inherently dangerous death-producing act before allowing application of the felony murder doctrine. In *Powers v. Commonwealth*,[43] for example, the Kentucky Supreme Court stated that the rule should apply only when the underlying felonious act has a natural tendency to produce the unintended death.[44] In *People v. Pavlic*,[45] however, the Michigan Supreme Court upheld a manslaughter conviction for a felony murder when the defendant's underlying felonious act of selling moonshine whiskey to the deceased was neither inherently dangerous nor malum in se. Other courts require a malum in se act.[46] California[47]

---

consummation, frustration or abandonment of attempt, are done in furtherance of felonious enterprise); People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930) (killing of escapee during prison break is act done in furtherance of felonious enterprise); People v. Sobieskoda, 235 N.Y. 411, 419-20, 139 N.E. 558, 561 (1923) (defendant not guilty of felony murder when cofelon shot unintended victim after defendant had abandoned joint plot). *See generally* Alderstein, *supra* note 27; Hitchler, *The Killer and His Victim in Felony Murder Cases*, 53 DICK. L. REV. 3, 6-11 (1948); Moessel, *supra* note 16, at 458; Morris, *supra* note 4, at 59; Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 542-43 (1934); *Recent Developments, Criminal Law: Felony Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 n.2 (1965); 9 RUT.-CAM. L.J. 368 (1977); Annot., 56 A.L.R. 3d 239 (1974).

42. IOWA CODE ANN. § 707.2 (West Cum. Supp. 1980); MONT. CODE ANN. § 45-5-102 (1979); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1981); TEX. CRIM. PROC. CODE ANN. § 19.02 (Vernon Supp. 1980).

43. 110 Ky. 386, 414, 61 S.W. 735, 741 (1901) (Kentucky court limited felony murder rule because all offenses punishable by confinement in penitentiary are felonies).

44. *Accord* Jenkins v. State, 240 A.2d 146 (Del. 1968), *aff'd*, 395 U.S. 213 (1969) (burglarizing junkyard not inherently dangerous act); People v. Carter, 387 Mich. 397, 197 N.W.2d 57 (1972) (abandoning car with man in open trunk not inherently dangerous); State v. Chambers, 524 S.W.2d 826 (Mo. 1975) (en banc) (car theft inherently dangerous), *cert. denied*, 423 U.S. 1058 (1976); State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973) (discharging firearm into occupied property inherently dangerous); Wade v. State, 581 P.2d 914 (Okla. Crim. App. 1978) (bringing pistol into crowded bar inherently dangerous); Commonwealth v. Bowden, 456 Pa. 278, 309 A.2d 714 (1973) (injecting heroin into known addict not inherently dangerous); Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973) (daytime breaking and entering and larceny inherently dangerous), *cert. denied*, 416 U.S. 958 (1974). *See also* People v. Phillips, 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 (1966) (en banc); People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965) (en banc); People v. Golson, 32 Ill. 2d 398, 207 N.E.2d 68 (1965); People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972). *See generally* 1 BISHOP, BISHOP ON CRIMINAL LAW § 336 (9th ed. 1923). Adlerstein, *supra* note 27; Kenny, *supra* note 23; Moessel, *supra* note 16; Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 KY. L.J. 788 (1971); *Felony Murder Rule, supra* note 27.

45. 227 Mich. 562, 199 N.W. 373 (1924).

46. *See, e.g.*, People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966); People v. Salas, 538 P.2d 437 (Colo. 1975); Jenkins v. State, 240 A.2d 146 (Del. 1968); State v. Williams,

and New York[48] courts also require an underlying felony completely independent from the homicide to avoid double jeopardy complications.[49]

The actor and victim limitations directly address the basic criminal law principle that requires individual culpability before imposition of liability. Certain states will not apply the felony murder rule unless a felon or a cofelon commits the killing,[50] or the victim is a nonfelon.[51] The Pennsylvania Supreme Court, for example, refused to impute malice from felonious acts unless the felon or accomplice was responsible for the killing.[52] By contrast, the California Supreme Court in *Taylor v. Superior Court*[53] convicted a defendant of felony murder under a vicarious liability theory for a death caused by a policeman.[54]

---

254 So. 2d 548 (Fla. App. 1971); State v. Galloway, 275 N.W.2d 736 (Iowa 1979); State v. Wallace, 333 A.2d 72 (Me. 1975). *See generally* R. PERKINS, *supra* note 4.

47. *See, e.g.,* People v. Ireland, 70 Cal. 2d 522, 539-540, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969) (en banc).

48. *See, e.g.,* People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927) (Cardozo, C.J.).

49. Thus, a court cannot try a defendant separately for the homicide and the underlying felony. Furthermore, a court cannot try a defendant for felony murder when the underlying felony is the assault that caused the death. A court may not try a criminal defendant twice for the same offense. U.S. CONST. amend. V. *Accord* State *ex rel.* Glenn v. Klein, 184 So.2d 904 (Fla. Dist. Ct. App. 1966) (felony murder trial of defendant for death of accomplice during robbery precludes trial for robbery); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972) (trial for murder precludes trial for lesser included offenses of larceny and breaking and entering); State v. Mowser, 92 N.J.L. 474, 106 A. 416 (1919) (conviction for robbery precludes conviction for murder committed during robbery). *See generally* Alderstein, *supra* note 27; Note, *Assault Leading to Homicide May be Used to Invoke Felony Murder Rule,* 28 MERCER L. REV. 371 (1976); Comment, *Merger and the California Felony Murder Rule,* 20 U.C.L.A. L. REV. 250 (1972); 7 U. BALT. L. REV. 345 (1978).

50. ARK. STAT. ANN. §§ 41-1501 to -1505 (1977); LA. REV. STAT. ANN. §§ 14:30, :31 (West 1974); MISS. CODE ANN. § 97-3-19 (Cum. Supp. 1975); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1980); N.D. CENT. CODE § 12.1-16-01 (1976); OR. REV. STAT. § 163.115 (1979); WASH. REV. CODE ANN. §§ 9A.32.030 to .045 (Supp. 1981). *See also* People v. Washington, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (en banc).

51. COLO. REV. STAT. § 18-3-102 (Cum. Supp. 1975); CONN. GEN. STAT. § 539-54c (1980); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1980); N.D. CENT. CODE § 12.1-16-01 (1976); OR. REV. STAT. § 163.115 (1979); WASH. REV. CODE ANN. §§ 9A.32.030 to .045 (Supp. 1981).

52. *See, e.g.,* Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970) (no first-degree felony murder if innocent bystander killed by policeman attempting to thwart robbery); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) (no first-degree felony murder when cofelon killed by policeman in gun battle during armed robbery). *See generally* Adlerstein, *supra* note 27; Hitchler, *supra* note 41; Moessel, *supra* note 17; Morris, *supra* note 41; Perkins, *supra* note 41; *Recent Developments, supra* note 41.

53. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275, (1970) (en banc) (innocent victim used as shield killed by policeman).

54. For an example of another case using the vicarious liability theory, see People v. Conely,

Restrictions regarding mental state actually negate the primary purpose of the felony murder doctrine by preventing automatic imputation of malice from the felony.[55] Some jurisdictions require a separate mens rea apart from the intent to commit the felony.[56] Some states differentiate statutory felony murder from common-law felony murder by requiring a separate finding of malice,[57] or by including this requirement in their statutory definitions of murder.[58] In *People v. Carter*,[59] the Michigan Supreme Court refused to hold that any killing committed during a felony is automatically murder because that would withdraw the essential question of malice from the jury.

The growing number of limitations on the felony murder rule evidence a gradual trend toward its abolition, as state courts and legislatures seek to ameliorate its potential for unduly harsh results. Eleven state legislatures have established affirmative defenses to statutory felony murder offenses, encompassing the act, actor, victim, underlying felony, and state of mind limitations that courts have applied to the rule.[60] Seven states have downgraded felony murder offenses to second- or third-degree murder, limiting application of the doctrine and reducing punishment for convictions.[61] Four states have now abolished the crime altogether. Kentucky, Hawaii, and Ohio have abro-

48 Cal. App. 3d 805, 123 Cal. Rptr. 252 (1975) (death resulting from gun battle initiated by felon and cofelons). *See also* Hornbeck v. State, 77 So.2d 876 (Fla. 1955) (en banc); People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952).

55. *See supra* note 49 and cases cited therein.

56. *See, e.g.*, Gray v. State, 463 P.2d 897 (Alaska 1970); People v. Goodchild, 68 Mich. App. 226, 242 N.W.2d 465 (1976); State v. Millette, 112 N.H. 458, 299 A.2d 150 (1972); State v. Harrison, 90 N.M. 439, 564 P.2d 132 (1977).

57. *See, e.g.*, State v. Galloway, 275 N.W.2d 736 (Iowa 1979); People v. Goodchild, 68 Mich. App. 226, 242 N.W.2d 465 (1976).

58. *See* Commonwealth v. Dorazio, 365 Pa. 291, 298-99, 74 A.2d 125, 129 (1950) (fist fight); Commonwealth v. Kelly, 333 Pa. 280, 4 A.2d 805, 807 (1939) (armed robbery); Commonwealth v. Exler, 243 Pa. 155, 159 (1914) (rape). *See generally* W. CLARK AND W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 333 (1952); Moessel, *supra* note 16, at 458.

59. 387 Mich. 397, 422, 197 N.W.2d 57, 69 (1972).

60. ALASKA STAT. §§ 11.15-010 to 11.40 (1978) (repealed 1978); ARK. STAT. ANN. §§ 41-1501 to -1505 (1977); COLO. REV. STAT. § 18-3-102 (Cum. Supp. 1975); CONN. GEN. STAT. §§ 53a-54c (1980); ME. REV. STAT. ANN., tit. 17A, § 9-203 (Supp. 1981); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1981); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1980); N.D. CENT. CODE § 12.1-16-01 (1976); OR. REV. STAT. § 163.115 (1979); VA. CODE §§ 18.2-32 to 18.33 (Supp. 1976); WASH. REV. CODE ANN. §§ 9A32.030 to .045 (Supp. 1981).

61. *See*, ALASKA STAT. §§ 11.41.110 to .115 (1978) (repealed 1978); LA. REV. STAT. ANN. § 14:30.1 (West 1974); MINN. STAT. ANN., §§ 609.185 to .195 (West Cum. Supp. 1980); N.Y. PENAL LAW § 125.25 (McKinney Supp. 1981); PA. STAT. ANN. § 7.18, § 2502 (Purdon Supp. 1973); UTAH CODE ANN. § 76-J-203(1) (Supp. 1980); WIS. STAT. ANN. §§ 939.50(3)(b), 940.02(2) (West 1982).

gated the rule by statute.[62] In Michigan, where the common law defines murder offenses, the Michigan Supreme Court eliminated the rule in *People v. Aaron*.[63] Until the *Aaron* decision, the Michigan courts continually modified and diluted the rule in the same piecemeal fashion as other states.[64] The extensive limitations on the rule's appli-

62. *See* KY. REV. STAT. § 507.020 (1974); HAWAII REV. STAT. § 707-701 (1972); OHIO REV. CODE ANN. § 2903.01 (Baldwin 1975).

63. 409 Mich. 672, 299 N.W.2d 304 (1980).

64. In People v. Potter, 5 Mich. 1 (1858), the Michigan Supreme Court first enunciated Michigan's definition of murder. "Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being . . . with malice . . . aforethought, either express or implied." *Id.* at 6.

Several early Michigan cases required proof of the common law elements of murder—malice aforethought, premeditation and deliberation—for a first-degree murder conviction. *See* Wellar v. People, 30 Mich. 13, 19 (1874) (intent must be equivalent in legal character to criminal purpose aimed against life); Maher v. People, 10 Mich. 212, 217 (1862) (state of mind, not act, constitutes offense); Pond v. People, 8 Mich. 149 (1860) (no malice aforethought when homicide occurs during victim's attempts to resist felon's breaking and entering). *See also* People v. Younger, 380 Mich. 678, 681, 158 N.W.2d 493, 495 (1968); People v. Morrin, 31 Mich. App. 301, 306, 187 N.W.2d 434, 436 (1971). *See generally* W. LAFAVE & A. SCOTT, *supra* note 35.

In *Maher v. People*, the court stated that the jury must determine the existence of malice from an independent evaluation of the evidence. The Michigan courts, however, have sometimes held that when the actor actually intends to inflict death or serious bodily injury, or when the natural tendency of his behavior is to cause death or serious bodily harm, his actions may create an inference of malice sufficient for first-degree murder. *See generally* People v. Borgetto, 99 Mich. 336, 58 N.W. 328 (1894); Nye v. People, 35 Mich. 15 (1876); People v. Morrins, 31 Mich. App. 301, 187 N.W.2d 434 (1971); W. LAFAVE AND A. SCOTT, *supra* note 35.

Under the Michigan murder statute, murders committed during certain enumerated felonies constitute first-degree murder. The statute provides:

> All murder which shall be perpetrated by means of poison, lying in waiting, or any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary [larceny of any kind, extortion or kidnapping] shall be murder of the first degree . . .

MICH. COMP. LAWS ANN. § 750.316 (Cum. Supp. 1976). Under Michigan statutory law, all other murders are second degree. MICH. COMP. LAWS ANN. § 750.317 (Cum. Supp. 1976).

Several early cases held that the statute merely raises the degree of certain murders, but does not supply a statutory definition of murder. These cases rely on the definition of murder as stated in People v. Potter, *supra*. *See* People v. Austin, 221 Mich. 635, 644, 192 N.W. 590, 593 (1923); People v. Scott, 6 Mich. 287, 293 (1859); People v. Doe, 1 Mich. 451, 457 (1850).

The Michigan courts have also modified the rule by placing additional requirements on the act, actor, and state of mind elements of the offense. *See generally* Note, *The Felony Murder Doctrine in Michigan,* 25 WAYNE L. REV. 69 (1978); *supra* notes 27-63 and accompanying text. One major modification includes jury instructions on lesser included offenses in felony murder cases, thus negating the implied malice aspect of the doctrine. *See* People v. Carter, 395 Mich. 434, 236 N.W.2d 500 (1975) (court upheld second degree murder conviction, but disapproved of court of appeals holding that there were no lesser included offenses in first degree felony murder); People v. Andrus, 331 Mich. 535, 50 N.W.2d 310 (1951) (manslaughter conviction allowed for death of man that defendants had assaulted, bound, and robbed); People v. Treichel, 229 Mich. 303, 200 N.W. 950 (1924) (manslaughter conviction for defendants who bound and robbed old man but left

cability led some Michigan courts to question the existence of the common-law felony murder rule in that state.[65]

In *People v. Aaron*[66] the Michigan Supreme Court found the common-law felony murder doctrine unnecessary[67] and in violation of the basic criminal law principle that requires individual culpability before imposing criminal liability.[68] Writing for the majority, Justice Fitzgerald began his analysis of the doctrine by tracing its development from its early common-law origins[69] to its diluted modern form.[70] Justice

---

notes instructing that he be untied); People v. Wimbush, 45 Mich. App. 42, 205 N.W.2d 890 (1973) (proof of elements of murder required before felony murder conviction will stand). *See, e.g.,* People v. Paul, 395 Mich. 444, 236 N.W.2d 486 (1975) (robbery); People v. Jones, 395 Mich. 379, 236 N.W.2d 461 (1975) (reckless discharge of firearm); People v. Henry, 395 Mich. 367, 236 N.W.2d 489 (1975) (breaking and entering with intent to commit larceny). *See also* People v. Jenkins, 395 Mich. 440, 442, 236 N.W.2d 503, 503 (1975).

In People v. Goodchild, 68 Mich. App. 226, 242 N.W.2d 465 (1976) in which a policeman was killed while chasing car thief, for example, the court stated that a homicide committed during one of the enumerated felonies, without independent proof of malice, is not murder, and an instruction on manslaughter is mandatory. The Michigan Supreme Court further modified the rule in People v. Carter, 387 Mich. 397, 197 N.W.2d 57 (1972), by requiring that the killing be attributable to the accused.

For further reading on the development of the law of murder and felony murder in Michigan, see generally Note, *supra*; *Criminal Law,* 23 WAYNE L. REV. 473, 504-11 (1977).

65. Several cases have held that the rule did exist in Michigan. *See* People v. Lovett, 85 Mich. App. 534, 272 N.W.2d 126 (1978) (rape); People v. Butts, 85 Mich. App. 435, 271 N.W.2d 265 (1978) (armed robbery); People v. Wilder, 82 Mich. App. 358, 266 N.W.2d 847 (1978) (armed robbery); People v. Till, 80 Mich. App. 16, 263 N.W.2d 586 (1977) (robbery and forcible entry). Several cases, however, held that the rule did not exist. People v. Hines, 88 Mich. App. 148, 276 N.W.2d 550 (1979) (conspiracy to commit armed robbery); People v. Smith, 87 Mich. App. 584, 274 N.W.2d 844 (1978) (robbery); People v. Dietrich, 87 Mich. App. 116, 139-40, 274 N.W.2d 472, 482 (1978) (robbery not conclusive as proof of malice aforethought); People v. Langston, 86 Mich. App. 656, 659, 273 N.W.2d 99, 100 (1978) (robbery); People v. Hansma, 84 Mich. App. 138, 142-43, 269 N.W.2d 504, 507 (1978) (attempted robbery); People v. Wilson, 84 Mich. App. 636, 638, 270 N.W.2d 473, 474 (1978) (robbery conviction upheld but lower court's instruction on implied malice held incorrect); People v. Martin, 75 Mich. App. 6, 254 N.W.2d 628 (1977) (robbery); People v. Fountain, 71 Mich. App. 491, 499, 248 N.W.2d 589, 593 (1976) (robbery). *See generally* Note, *supra* note 64.

66. 409 Mich. 672, 299 N.W.2d 304 (1980).

67. *Id.* at 728, 299 N.W.2d at 327.

68. *Id.* at 708, 299 N.W.2d at 317.

69. *Id.* at 689-98, 229 N.W.2d at 307-12. Justice Fitzgerald began his analysis with Sir Edward Coke's interpretation of *Lord Dacres' Case*, 72 Eng. Rep. 458 (K.B. 1535). *See supra* notes 13-14 and accompanying text. Next, Justice Fitzgerald discredited Lord Coke's statement of the felony murder doctrine using Justices Stephens, Perkins, and Moreland to support his argument. For a general discussion of the common-law felony murder rule, see *supra* notes 13-64 and accompanying text.

70. 409 Mich. at 669-713, 299 N.W.2d at 312-19. For further discussion of these cases, see *supra* notes 27-64 and accompanying text.

Fitzgerald summarized the limitations applied to the felony murder rule[71] by contemporary American courts[72] and concluded that at present the felony murder rule does not resemble the traditional rule.[73] This dissimilarity led the court to question the continued efficacy of the rule. Although the rule did not broaden the definition of murder when first developed, it has since had that effect on the offense.[74] Justice Fitzgerald criticized the doctrine's failure to incorporate a culpable state of mind into murder offenses[75] and concluded that the rule was of questionable origin and unnecessary.[76]

The court discussed the felony murder doctrine in Michigan, beginning with the common-law definition of murder.[77] Justice Fitzgerald explained that Michigan's felony murder statute does not classify a homicide committed during the perpetration of an enumerated felony as murder. Instead, Michigan's statute classifies a common-law murder committed during the perpetration of certain felonies as first-degree murder.[78] The court observed that the intent of a first-degree murder

71. 409 Mich. at 699-701, 299 N.W.2d at 312-13. The limitations are that the felonious act must be dangerous to life, the homicide must be a natural and probable consequence of the felonious act, and the death must be proximately caused by the felonious act. Some courts require that the killing be the result of an act done in furtherance of the felonious purpose. Some courts also consider the identity of the victim and of the person causing the death. *See supra* notes 31-64 and accompanying text.

72. *See generally* cases cited *supra* notes 31-77 and accompanying text.

73. 409 Mich. at 706-07, 299 N.W.2d at 316.

74. *Id.* at 706-07, 712, 299 N.W.2d at 316, 319.

75. *Id.* at 708-09, 299 N.W.2d at 316-17. Justice Fitzgerald stated that this problem is most evident in cases in which a cofelon who took no part in the killing is held liable for felony murder because he participated in the felonious enterprise. The justice also noted that another problem may occur in states in which felony murder is a first-degree offense. In those states, an accidental killing that occurs during a felony may result in a first-degree felony murder conviction; whereas, an intentional killing that is not committed during a felony will result in a second-degree murder conviction with a less severe punishment.

76. *Id.* at 689, 299 N.W.2d at 307.

77. The court adopted the definition of murder from People v. Potter, 5 Mich. 1, 6 (1858).

78. MICH. COMP. LAWS ANN. § 750.316 (Cum. Supp. 1980). *See* 409 Mich. at 718-719, 299 N.W.2d at 322. Other states with statutes identical to Michigan's first-degree murder statute are in agreement with the *Aaron* court's interpretation of the purpose for the statute.

Justice Ryan, in his concurring opinion, disagreed with the majority's interpretation of the felony murder rule. He stated that felony murder and actual murder are not at all similar, and that malice is not required in felony murder cases. *Id.* at 727-28, 299 N.W.2d at 327 (Ryan, J., concurring). The justice asserted that the major difference after abrogation of the rule will be that the jury may not find malice solely from the intent to commit the underlying felony. The jury may still consider the facts and circumstances of the homicide, including the nature of the felonious act. Justice Fitzgerald believes that the rule is unnecessary in cases involving an inherently dangerous felony because the required mental state can be established without invoking the doctrine.

statute is to graduate punishment rather than to charge the accused with murder for a death at the scene of a felony.[79] The court therefore concluded that Michigan had not codified the common-law felony murder rule.[80] The court stated that abrogation of the felony murder rule would have little effect on subsequent cases because the rule had been completely diluted and modified.[81]

The Michigan Supreme Court's decision in *People v. Aaron* to abolish common-law felony murder is commendable. Harsh application of the traditional rule is unjust and violates principles of individual criminal culpability. For example, the unfairness of the rule exists in states in which felony murder is a first-degree offense.[82] In those states, a

---

Id. He also concluded that if all the accomplices are acting intentionally, agency principles will suffice to establish the cofelon's liability, rendering the doctrine useless. He further asserted that using the felony murder docrine to hold a cofelon liable for his accomplice's killing is unjust and violates the basic criminal law requirement of individual moral culpability. Justice Ryan asserted that felony murder only requires "the commission or attempt to commit a felony, and a killing causally connected with that commission or attempt." *Id.* at 741-43, 299 N.W.2d at 333. Justice Williams, in a separate concurring opinion, concluded that the language of the statute itself proves the necessity for a finding of malice in a felony murder case. According to Justice Williams, the use of the word "murder" in the statute, in lieu of "killing" or "homicide," indicates that only those homicides committed with the malice aforethought required to make the offense murder are included in the statute. *Id.* at 746, 299 N.W.2d at 335 (Williams, J., concurring).

79. *Id.* at 717-21, 299 N.W.2d at 321-23. *See also* Commonwealth v. Redline, 391 Pa. 486, 494, 137 A.2d 472, 475-76 (1958). *See supra* note 52 and accompanying text. The Pennsylvania legislature amended the statute in 1974, but that modification does not affect the court's prior interpretations of the older version of the statute. PA. STAT. ANN. tit. 18, § 2502 (Purdon Supp. 1973).

80. 409 Mich. at 719-20, 299 N.W.2d at 322.

81. 299 N.W.2d at 327. The court stated that the effect will be that the jury may not find malice from the intent to commit the underlying felony alone. The jury may still consider the facts and circumstances surrounding the homicide, including the nature of the felonious act. Justice Fitzgerald stated that the rule is unnecessary in cases involving an inherently dangerous felony because the required mental state can be established without invoking the doctrine. He also concluded that in cases involving groups of cofelons, if all the accomplices are acting intentionally, then agency principles will suffice to establish liability; thereby rendering the felony murder doctrine useless in those cases. He further asserted that in cases in which an innocent cofelon would be held liable for a killing done by an accomplice, application of the felony murder doctrine is unjust and in violation of the basic principle of criminal law requiring individual moral culpability.

82. *See* ARIZ. REV. STAT. ANN. § 13-1105 (Supp. 1980-81); CAL. PENAL CODE § 189 (Deering Supp. 1980); COLO. REV. STAT. § 18-3-102 (Cum. Supp. 1975); FLA. STAT. ANN. § 782.04 (West Cum. Supp. 1981); IND. CODE § 35-42-1-1 (Cum. Supp. 1981); IOWA CODE ANN. § 707.2 (West Cum. Supp. 1981); KAN. STAT. ANN. § 21-3401 (Cum. Supp. 1980); MD. ANN. CODE art. 27, §§ 407-410 (Cum. Supp. 1980); MINN. STAT. ANN. §§ 609.185-.195 (West Cum. Supp. 1981); MISS. CODE ANN. §§ 97-3-19 to -20 (Cum. Supp. 1980); MO. REV. STAT. § 565.003 (Cum. Supp. 1980); NEB. REV. STAT. § 28-303 (Cum. Supp. 1980); NEV. REV. STAT. §§ 200.010j to .030 (1979);

first-degree felony murder conviction requires no proof of malice or intent to kill even though a second-degree murder conviction requires proof of intent. An individual who intentionally kills may therefore receive a less severe punishment than an individual who accidentally kills while committing a felony.[83] In other degrees of murder, the prosecution must establish the actor's mental state as an element of the offense. To ignore that element in a charge as severe as first-degree murder is unfair and illogical.[84]

Mandatory lesser included offense instructions partially alleviate the punishment problem in applying the felony murder rule. If a homicide committed during a felony is murder in some degree, then regardless of the defendant's state of mind or the dangerousness of the underlying felony, the court will ignore the fundamental principle of individual culpability. Furthermore, if courts allow lesser included offense instructions or if the homicide is not automatically deemed first-degree murder, the rule becomes unnecessary. If the defendant's felonious act is inherently dangerous and manifests extreme indifference to the value of human life, then the malice required for a murder conviction is present. There is no need to impute malice automatically without consideration of the surrounding circumstances and the defendant's state of mind.[85]

By abolishing the felony murder rule, the Michigan Supreme Court is, in effect, equalizing the treatment of felony killers and nonfelony killers. If the jury finds all the necessary elements of murder present, the court will convict the defendant of murder, regardless of his felon or nonfelon status. If, however, the element of malice is absent, the felony killer will rightfully be in the same position as the nonfelony killer who commits a reckless homicide.

The *Aaron* court reached a just result. Abrogation of the felony mur-

N.J. STAT. ANN. § 14-17 (West Cum. Supp. 1979); R.I. GEN. LAWS § 11-23-1 (Cum. Supp. 1980); VT. STAT. ANN. tit. 13, § 2301 (Cum. Supp. 1981); WASH. REV. CODE ANN. § 9A.32-030 (Cum. Supp. 1981); W. VA. CODE ANN. § 61-2-1 (Cum. Supp. 1981); WYO. STAT. § 6-4-101 (Cum. Supp. 1981).

83. This problem is especially apparent in the cases in which a cofelon is held responsible for an accidental death caused by one of his cofelons.

84. *See* Note, *supra* note 64.

85. The authors of the Model Penal Code found that in New Jersey, in 1975, only .41% of the reported robberies and only .10% of the reported forcible rapes and burglaries resulted in deaths. Based on these statistics, an automatic imputation of malice from the intent to commit such felonies is both unnecessary and unfair. *See* MODEL PENAL CODE § 210.2 comment 6 at 38 n.2 (Proposed Official Draft 1980).

der rule in Michigan, in light of its numerous limitations, will have a de minimus effect on the administration of future cases. The *Aaron* court's decision will prevent the blanket application of an unfair disadvantage to a particular class of defendants. Furthermore, *Aaron* will serve as persuasive authority for the courts and legislatures of other states that are considering the abolition of the rule.

D.L.A.